

Common Knowledge, Pragmatic Enrichment and Thin Originalism

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Abstract

The *meaning* of an utterance is often *enriched* by the pragmatic context in which it is uttered. This is because in ordinary conversations we routinely and uncontroversially compress what we say, safe in the knowledge that those interpreting us will “add in” the content we intend to communicate. Does the same thing hold true in the case of legal utterances like “This constitution protects the personal rights of the citizen” or “the parliament shall have the power to lay and collect taxes”? This article addresses this question from the perspective of the constitutional originalist — the person who holds that the meaning of a constitutional text is *fixed* at some historical moment. In doing so, it advances four theses. First, it argues that every originalist theory is committed to some degree of pragmatic enrichment, the debate is about how much (*enrichment thesis*). Second, that in determining which content gets “added in”, originalists typically hold to a common knowledge standard for enrichment, protestations to the contrary notwithstanding (*common knowledge thesis*). Third, that the common knowledge standard for enrichment is deeply flawed (*anti-CK thesis*). And fourth, that all of this leads us to a thin theory of original constitutional meaning — similar to that defended by Jack Balkin and Ronald Dworkin — not for moral reasons but for strictly semantic ones (*thinness thesis*). Although some of the theses are extant in the literature, this article tries to defend them in a novel and perspicuous way.

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1. Introduction

There is a sign on the wall that says “Please close all the doors!” What is its communicative content? Clearly, it cannot refer to *all* the doors in the world — that would be silly. It must, instead, refer to some subset of doors, presumably those in the building or room in which the sign resides. How can I determine which? Well, I could look to the context. The sign is on the wall in a room with three doors, not in a corridor. That might suggest it is only referring to doors within the room. Furthermore, I know the sign was put up on the wall last week, after there was a complaint about someone leaving one of the doors in this particular room open. That settles it, surely? The sign must be asking me to close all the doors in this room, not in the building as a whole. I duly do so before exiting.

This example provides an illustration of *pragmatic enrichment* and the role it plays in textual interpretation. Pragmatic enrichment is the common, unavoidable, and generally uncontroversial practice whereby the meaning of an utterance is enriched by the pragmatic context in which it is uttered. The practice is common, uncontroversial and unavoidable because speakers frequently compress intended communicative content.¹ In other words, they say less than is required because they count on others to fill-in the gaps. Hence, in the case of the sign, they don’t add the restrictive clause (“Please close all the doors *in this particular room!*”) because that restriction is obvious in the relevant context. It just *is* part of the meaning of that utterance.

Now consider a legal example. A constitutional text says “The government shall protect the personal rights of the citizen”.² What is it trying to communicate? Is it referring to *all* the rights a person could possibly have? Or is it referring to some restricted subset of such rights as was obvious in a particular historical context? In other words, is the communicated meaning of this utterance enriched by the context in which it was uttered or is it open-ended and unrestricted? Must this be answered by reference

¹ Asgeirsson, H. “Textualism, Pragmatic Enrichment and Objective Communicative Content” (2012) *Monash University Faculty of Law Legal Research Paper 2012/21* - All references in this article are to the version that can be found here: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2142266 (accessed 31/7/14).

² Though I use a rights-protective clause as an example, this is not because pragmatic enrichment is only relevant in such cases. I assume throughout this article that it can apply to most clauses within a written constitution. For instance, it is equally relevant to the interpretation of power-conferring clauses (e.g. powers to tax, spend and legislate), and to clauses which apply some technical legal term of art. The only case in which its relevance is less clear is when a constitutional text establishes certain institutions and roles (e.g. who or what can count as a president or house of parliament?). This is because such clauses frequently stipulate the meaning that attaches to the named institution or role. I am indebted to an anonymous reviewer for encouraging me to clarify this point.

to moral/political desiderata, or can purely linguistic/semantic desiderata do all the necessary work?

This article considers these questions in light of the originalist approach to constitutional interpretation. In the process it defends four theses:

The Enrichment Thesis: Originalism doesn't make much sense as a theory of constitutional interpretation unless constitutional utterances are pragmatically enriched *to at least some degree*. The debate is about how great a degree of enrichment can take place. Conservative/thick originalists think that there can be a considerable degree of enrichment; liberal/thin originalists think there is very little.

The Common Knowledge Thesis: In determining how much enrichment can take place, originalists typically appeal to a *common knowledge standard*. In other words, they hold that a contextual factor, C, can be taken to enrich the meaning of an utterance, U, provided that C is common knowledge between the speaker and the hearer of the constitutional utterance. This is an attractive standard because it appears to provide a purely factual basis for determining communicated content.

The Anti-Common Knowledge Thesis: The common knowledge standard for enrichment, appealing though it may be, often fails in the legal context. This is because the strategic nature of legal speech blocks the route to common knowledge.

The Thinness Thesis: Though the failure of the common knowledge standard might be thought to reduce the debate over constitutional originalism to a purely moral/political one, there are in fact sound linguistic/semantic reasons for endorsing a thin version of originalism.

To be clear, some of these theses are not particularly novel and I do not claim that they are. What I aim to do is to clarify the connections between them, and to present new and more persuasive arguments in their favour. The article proceeds in four main sections, each of which defends one of the four theses.

2. The Enrichment Thesis

This section defends the Enrichment Thesis. It does so while mapping some of the dialectical terrain in which the originalism debate takes place and showing why the Enrichment Thesis is an important site of contestation within that terrain. As will become clear, I believe the Enrichment Thesis is unproblematically entailed by the originalist commitment to fixity of meaning. The challenge is to show why this thesis is at the heart of a more interesting debate about the viability of originalism.

2.1 - A Quick Tour of Originalism

It is a truth universally acknowledged that in any jurisdiction with a written constitution, the text of that constitution plays some foundational and constraining role in its legal system. Though it plays this role throughout the legal system, of particular interest in this article is its impact on the adjudicative process. Presumably judges, who have often promised or sworn to uphold the constitution, are bound by its words. The commonsensical view is that this entails that the communicated content (*i.e.* meaning) of the constitutional text is, at the very least, a constraining reference point for their activities. But what is the communicated content of the constitutional text?

The originalist answer to that question is a distinctive one. To borrow Solum's terminology,³ although there are many schools of originalist thought,⁴ they would all seem to be committed to the following thesis:

Fixation Thesis: The meaning of the constitution is fixed at the time of drafting or ratification or, more generally, at the time of "origin".

To many originalists, this thesis is factual, not normative or moral, in nature. Randy Barnett, for instance, says: "[w]ords have an objective social meaning at any given time that is independent of our opinions of that meaning."⁵ And Solum claims: "When we make assertions about what an utterance means, we are making factual assertions about the world...Semantics is one thing, normative theory is another."⁶

To be sure, originalists also present moral arguments for thinking that we ought to follow the original meaning. Even if we agreed that communicated content was fixed at or around the time of ratification, we would still ask why the historical meaning should be binding on us now. Nevertheless, I want to pursue the supposedly factual side of the debate in this article. I do so for two reasons. First, I think that the allegedly factual nature of the fixation thesis makes it appealing to a certain sort of judicial self-conception: if a judge thinks she has sworn to uphold the communicated content of the

³ From Solum, L. "Originalism and Constitutional Construction" (2013) 82 *Fordham Law Review* 454, p. 459.

⁴ See Solum, L. "What is Originalism? The Evolution of Contemporary Originalism" in Huscroft, G. and Miller, B. (eds) *The Challenge of Originalism* (Cambridge: Cambridge University Press, 2011) for an overview of the different branches of originalism.

⁵ Barnett, R. "Interpretation and Construction" (2011) 34 *Harvard Journal of Law and Public Policy*, 65-72, p. 66

⁶ Solum, "Semantic Originalism" (2008) *Illinois Public Law Research Paper No. 07-24*, pg. 27. References are to the November 22nd 2008 version, which is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244 (accessed 31/7/14).

constitution, and that she has no democratic authority to issue moral or political judgments, then the notion that there is a factual core to meaning will seem quite attractive. Second, I think that by exploring the Enrichment Thesis we can see how plausible the factual claim really is.

Granting that the fixation thesis is factual in nature, a complication must be addressed. Among certain prominent contemporary originalists,⁷ there is a distinction drawn between two judicial activities: *interpretation* and *construction*. The interpretive activity is that of discovering the meaning of the text. For those committed to the fixation thesis this is an empirical endeavour. The constructive activity applies that meaning to a particular context or dispute. This sometimes requires constructing new rules or tests that make the text work in specific settings. For example, the Lemon Test, under U.S. constitutional law, is a judicially created rule for applying the meaning of the First Amendment to the U.S. Constitution: it presents a three pronged test for determining whether a legislature has breached the requirements of the Establishment Clause. This test is constructed, not interpreted. The importance of the distinction is that the constructive process is not a purely factual one and can involve a degree of moral and political theorising.

The amount of space there is for construction is a key dispute between two originalist schools of thought. The first is that of *thick originalism*.⁸ According to thick originalism there is quite a lot of content in the constitutional text. As a result, there is a limited scope for morally and politically motivated judicial construction (if, indeed, there is any such scope). For the purposes of this article, representatives of this view will include McGinnis and Rapoport, Randy Barnett, and Lawrence Solum. McGinnis and Rapoport clearly belong in this camp, as they object quite strenuously to the use of construction in constitutional adjudication; Solum and Barnett are somewhat more uncertain members. Although both acknowledge a robust role for construction, they do nevertheless have a reasonably thick view of original meaning. This becomes apparent when we consider their views about pragmatic enrichment, below.

⁷ Solum “The Interpretation-Construction Distinction” (2010) 27 *Constitutional Commentary* 95-118; Solum 2011 (n 5) and Barnett, R. 2011 (n 5)

⁸ Terminology from Jack Balkin, “Must we be faithful to Original Meaning?” (2013) 7(1) *Jerusalem Review of Legal Studies* 57-86

At any rate, they certainly have a thicker view of original meaning than that found amongst the *thin originalists*. According to thin originalists there is very little communicated content in the constitutional text. The text just sets out very broad moral/political principles, which provide a framework for constitutional thought and practice. This framework leaves much scope for moral and political theorising. For the purposes of this article, representatives of this view will include Ronald Dworkin and Jack M. Balkin. Both have a similar conception of the constitutional text setting out abstract moral principles, though both emphasise different arguments in defence of this view.⁹ Balkin endorses thin originalism;¹⁰ Dworkin does not, but offers some reasons for thinking that, if you were to be an originalist, the thin view is the more plausible one.¹¹

My central contention in the remainder of this article is that the debate between these two views can be partly resolved by considering the role of pragmatic enrichment in constitutional interpretation. Thick originalists think that the communicated content of the constitution is significantly enriched by the context in which it was produced; thin originalists think that it is not. I will argue that the thin originalists are more likely to be correct, not for moral and political reasons, but for linguistic reasons. In doing this, I do not mean to provide a full-blown defence of thin originalism. I intend merely to argue that, when it comes to the linguistic side of the originalist debate, the thin originalists get it right.

2.2 - Defending The Enrichment Thesis

To understand the Enrichment Thesis we will need to pick up some technical baggage. The first thing we need is a clearer sense of what pragmatics is, and how it differs from and overlaps with semantics. The distinction between the two is problematic, to be sure, but can be defined as follows:¹² *semantics* covers the conventional meaning of words and sentences, *i.e.* the meaning that is coded into words and sentences; *pragmatics* covers meaning in context, *i.e.* the context-specific properties of an utterance. *Pragmatic enrichment* is the phenomenon whereby those context-specific

⁹ Dworkin presses linguistic arguments for example “The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe and Nerve” (1997) 65 *Fordham Law Review* 1252; Balkin places a greater emphasis on moral and political ones (previous note). For a critique of both, see McGinnis, J. and Rappoport, M. “The Abstract Meaning Fallacy” [2012] *University of Illinois Law Review* 737

¹⁰ Balkin (n 8) and Balkin, *Living Originalism* (Harvard: Harvard University Press, 2011)

¹¹ Dworkin (n 9) and Whittington, K. ‘Dworkin’s “Originalism”: The Role of Intentions in Constitutional Interpretation’ (2000) 62(2) *Review of Politics* 197-229

¹² Yule, G. *Pragmatics: An Introduction* (Oxford: OUP, 1996); Korta and Perry “Pragmatics” (2011) *Stanford Encyclopedia of Philosophy*, available at <http://plato.stanford.edu/entries/pragmatics/> (accessed 31/7/14)

properties get “added in” to the semantic content. “Add in” might be misleading here since enrichment does not normally expand the meaning of the utterance; more often than not it restricts or renders it more precise.

Enrichment is common and uncontroversial in many *ordinary conversational contexts*. It is common because, as mentioned, we frequently compress meaning into communicative forms that do not conventionally encode our intended meaning. It is uncontroversial for two reasons. First, because these compressed communicative forms are so common it just seems natural for us to “add in” the meaning. For example, Asgeirsson¹³ notes the verb “to use” can be naturally restricted in the phrase “it shall be an offence to use a firearm...” so as to read “use in the functionally dominant sense that a firearm is to be used”, not “use as a paperweight” or as “use as a hammer”. Second, in the ordinary conversational context, the conversational partners typically want to understand and be understood. Consequently, they are quite willing to fill the gaps in the conventional meaning.¹⁴ Thus, for example, I can grunt “door!” at my roommate when he enters the room, and he understands that I want him to close the door because we are cooperative partners in this communicative context.

The question is whether this carries over to the case of originalist constitutional interpretation. The Enrichment Thesis holds that it does. More precisely, it holds that originalism doesn’t make much sense unless constitutional utterances are enriched to at least some degree by contextual factors present at the time of drafting or ratification.

There are two ways to prove this point. The first is to present an “in fact” argument in favour of the thesis. This argument shows that every originalist theory does, *as a matter of fact*, allow for some degree of enrichment. This is readily apparent if we examine the thickest of the versions of originalism under consideration here: McGinnis and Rapoport’s *original methods originalism*. According to this theory, it is not just the conventional or intended word meanings that form part of the communicative content of the constitution; it is also the (legal) interpretive rules and practices that were in operation at the time that the constitutional text was produced.

¹³ Asgeirsson (n 1) pp. 6-7

¹⁴ For a legal discussion, see Poggi, F. “Law and Conversational Implicature” (2011) 24 *International Journal for the Semiotics of Law* 21-40.

These rules and practices are an essential part of the background against which it must be interpreted. As they put it:¹⁵

“[W]ord meanings and grammatical rules do not exhaust the historical material relevant to constitutional interpretation. There are also interpretive rules, defined as rules that provide guidance on how to interpret the language in a document. It is our position that originalism requires modern interpreters to follow the original interpretive rules used by the enactors of the Constitution as much as the original word meaning.”

Each interpretive rule and practice that the authors deem relevant to constitutional interpretation represents a contextual factor that enriches its communicated content. Hence, for this theory at any rate, the Enrichment Thesis — even if it is not recognised and named in those terms — is an essential part of the picture. I submit that if one investigated each and every originalist theory in detail, one would find the same thing to be true in each and every instance. It is certainly true of Barnett’s version of originalism, which clearly demands that features of the historical context be added-in when interpreting the constitution, and also of Solum’s version. It is also clearly true for thin originalists. For example, Balkin’s theory repeatedly emphasizes how context-specific features of the socio-political history of the American Constitution should shape the interpretation of the text. Indeed, he could be viewed as mounting (in part) an enrichment-based argument for thin originalism.¹⁶

The exhaustive enumeration of such examples would be both unnecessary and inconclusive because a complete “in fact” argument would, at best, provide contingent support for the Enrichment Thesis. It would only show that the thesis holds in our possible world. But what about other possible worlds? Even if you were persuaded by the “in fact” argument, it might be tempting to see whether a theory of originalism could be crafted that excludes enrichment of any kind. It is my contention that this is impossible because there is a stronger “in principle” argument for the Enrichment Thesis. Very simply, this argument holds that:

¹⁵ McGinnis, J and Rappoport, M. “Original Methods Originalism” (2009) 103 *Northwestern University Law Review* 751-802, p. 756

¹⁶ On the basis that it is the socio-political context that he feels should lead one to endorse the thin conception of original meaning. I say this is only “in part” an enrichment-based argument since Balkin also emphasizes moral-political reasons for endorsing thin originalism.

Enrichment Argument

- (1) Fixity entails enrichment (to at least some degree).
- (2) Fixity is essential to originalism.
- (3) Therefore, originalism entails enrichment.

The first premise is the important one. To defend it, I turn to an example used by Lawrence Solum to motivate the fixation thesis. Call this the “Message-in-a-bottle” argument.

“Suppose you wanted to send a message in a bottle and thereby successfully communicate with an unknown reader, perhaps in a distant land generations from now. You couldn’t rely on the reader’s knowing anything about you, your intentions, or the context in which you wrote the message. You would have to rely on the plain [i.e. public/conventional] meaning of the words you used and the rules of English syntax and grammar. Of course, those meanings and rules might change over time, so it would be a good idea for you to date your message: if the reader were interested enough, he or she could check his or her assumptions about the plain meaning of your text against historical evidence of linguistic practices.”¹⁷

Here, Solum suggests that in order to send a message to an unknown recipient who is temporally and spatially removed from you (which is essentially what one does in producing a constitutional text), one would have to date the message so as to avoid problems created by changes in meanings and linguistic practices over time. This is so that the recipient could check the meaning against the linguistic practices of the time and place in which you wrote the message, and thereby figure out what is being communicated. But what is that really saying? It is saying that in order to successfully communicate content in that medium one needs to tie the meaning to a particular historical context and provide the reader of the text with access *to at least some* of the properties of that context, namely the conventional linguistic practices *at that time*. This necessitates enriching the text to at least some degree.

¹⁷ Solum, L and Bennett, R. *Constitutional Originalism: a Debate* (New York: Columbia University Press, 2011) pp. 14-15

One could counter-argue that those conventional practices are part of the semantic, rather than pragmatic, properties of the text and hence Solum's example proves nothing about pragmatic enrichment.¹⁸ But this is to misunderstand my argument. Although the line between semantics and pragmatics is contentious – and so one might be able to argue that conventional linguistic rules are part of the pragmatic, context-specific background – my argument does not rest on the belief that the historical conventional linguistic rules are pragmatically enriching the text. Instead, my argument is that, in order to fairly claim that communicated content is fixed by those historical conventional linguistic rules, one must make assumptions about the pragmatic context in which a message was created. Look at it from the interpreter's perspective. For the interpreter to justify the fixation claim in the “message-in-a-bottle” case they must assume that the sender of the message intended for the message to be communicated to a spatially and temporally distant audience. These assumptions force them to draw upon token-specific claims about the pragmatic context in which that message was created. These claims (are alleged to) warrant the fixation. Without them, one cannot get the fixation. This is what I mean by saying that fixity entails enrichment, to at least some degree.

This gives us the first premise of the “in principle” argument and completes the defence of the Enrichment Thesis.

3. The Common Knowledge Thesis

Once you accept that there must be some degree of pragmatic enrichment, the next step is to figure out the standard for deciding which contextual factors get added-in. In this section, I want to argue that originalists tend to appeal to a common knowledge standard of enrichment. In other words, they hold the following:

Common Knowledge Standard: A contextual factor, C, can be taken to enrich the meaning of a constitutional utterance, U, if C is common knowledge between the speaker and the hearer of the constitutional text.

¹⁸ I would like to thank an anonymous reviewer for pushing me on this point.

Common knowledge is a tricky and subtle concept. Defined formally¹⁹ a contextual factor C can be said to be common knowledge between two individuals, S₁ and S₂, provided that S₁ knows C and S₂ knows C; S₁ knows that S₂ knows C, and S₂ knows that S₁ knows C; S₁ knows that S₂ knows that S₁ knows C, and S₂ knows that S₁ knows that S₂ knows C; and so on *ad infinitum*. Common knowledge is importantly different from another concept, *mutual knowledge*, which will be discussed in section 4.

The common knowledge standard is attractive to originalists because it retains the factual core they demand from the fixation thesis. Whether or not a certain factor is common knowledge between the speaker and hearers of a constitutional text is a purely factual matter. Either it is common knowledge, or it isn't, or it's undecidable whether it was or not.²⁰ Either way, it's not something that is determined by reference to normative, moral or political goals.²¹ This is something that is particularly attractive to thick originalists, who typically have a conservative impulse toward constraining the amount of morally or politically motivated adjudication.

How can I claim that the common knowledge standard is dominant? A *prima facie* argument for this thesis can be made by scrutinising the writings of Solum and McGinnis and Rapoport. To understand what they say, one must first appreciate the distinction between two approaches to originalist meaning: *intentionalism* and *conventionalism*. According to intentionalism, the communicated content of the constitution is determined by the intentions of its speakers or authors (whoever they may be). According to conventionalism, the communicated content is determined by the original public meaning of the words and clauses used in the constitutional text.

Solum appeals to common knowledge in his defence of conventionalist originalism. He does so by using the classic Gricean analysis of intentionalism. This analysis holds that common knowledge of speaker's intentions is essential for this type of meaning to apply. But as Solum notes, one of the difficulties in the legal context is identifying who the speaker was and what their intentions were. Legal texts are often produced by many "speakers", and these speakers do not always disclose their intentions. For this reason, Solum has argued that the conditions for Gricean

¹⁹ Vanderschraaf, P and Sillari, G. "Common Knowledge" (2011) in *Stanford Online Encyclopedia of Philosophy*, available at <http://plato.stanford.edu/entries/common-knowledge/> (accessed 31/7/14)

²⁰ Originalists can be comfortable with this option, cf. the discussion of Barnett's view, below.

²¹ This is not strictly true, of course, since the belief that a factual core is needed is going to be based on a moral/political principle.

intentionalist meaning, particularly the common knowledge-related conditions, break down in the constitutional context. As he puts it: “[i]t is *not* that we *chose not* to attribute framers’ [i.e. speakers’] meaning to the Constitution. Rather it is that the Constitution *does not have* framer’s meaning.”²² He uses this as a basis for defending the conventionalist approach. And he does so for the precise reason that the linguistic practices of the time, as well as numerous other facts in the public domain, would meet the conditions for common knowledge:²³

“Given that framers and ratifiers believed that readers engaged in American constitutional practice would know the public context and that they would also know that the framers and ratifiers would believe that they would have such knowledge, the public[ly] available context satisfies the conditions for common knowledge and can successfully determine clause meaning.”

Although Solum is careful not to give a full specification of the contextual factors that can enrich the meaning of the text — beyond the obvious publicly-known word meanings — it is very clear that in this passage he appeals to the common knowledge standard for enrichment.

McGinnis and Rapoport are a little bit more agnostic and ecumenical in their approach, holding that whether one is an intentionalist or a conventionalist, the commonly known interpretive rules and practices of the time will enrich meaning. Their reason for thinking this holds in the case of the conventionalist is a straightforward application of Solum’s idea:²⁴

“If the authors and readers of a document know that certain interpretive rules are generally deemed applicable to that document, and if the authors wrote that document expecting those rules to be used by their readers, then it is hard to understand how one could believe that these rules are not essential for determining the original public meaning.”

²² Solum (n 9) p. 48, emphasis original. By framer’s meaning he means the equivalent of speaker’s meaning, which is intentionalist in nature.

²³ Solum, (n 9) p. 51; and Solum (n 2)

²⁴ McGinnis and Rapoport (n 15), p. 762.

McGinnis and Rapoport's argument in relation to intentionalism is a little more subtle and difficult to mould into the common knowledge standard. Still, I think this is possible. Although they accept that the intentionalist framework can have its problems, they think that common knowledge of interpretive rules and practices helps to solve some of them. As noted, the big problem for intentionalism is that texts are approved by numerous voters (i.e. legislators and ratifiers) with multiple unknown intentions. This means it is difficult to know what the collective intent was. But as McGinnis and Rapoport argue.²⁵

“The possibility of multiple meanings would be significantly reduced or eliminated if legislators understood that the words of a law would be interpreted in accordance with applicable rules, such as accepted word meanings, grammar and interpretive [legal] rules”

And, of course, the legislators do understand that the words are going to be interpreted in line with those rules, meanings and practices because those things are common knowledge (or so, at least McGinnis and Rapoport argue) between speakers and hearers of the constitutional text. Hence, it seems fair to say that McGinnis and Rapoport think that the common knowledge standard, because it allows for enrichment by those contextual factors, saves the intentionalist framework.

These two examples give some *prima facie* support for the Common Knowledge Thesis. But there is a rebuttal lurking in the work of Randy Barnett. In some of his writings,²⁶ Barnett appears to adopt an alternative standard for enrichment, one that does not appeal to common knowledge. Barnett's alternative must be taken seriously since, among originalist scholars, he has arguably done the most to clarify and address the enrichment issue.²⁷

Barnett's alternative standard for enrichment appeals to two key concepts: *ambiguity* and *vagueness*. His argument is that enrichment takes place in the case of ambiguity but not in the case of vagueness. A word or phrase is ambiguous whenever it has two or more meanings. An example would be the word “ring” in the question “Can

²⁵ McGinnis and Rapoport (n 17), p. 760.

²⁶ Barnett, R. “The Misconceived Assumption about Constitutional Assumptions” (2009) 103(2) *Northwestern University Law Review* 615-661 and Barnett (n 8)

²⁷ Barnett (n 26)

you give me a ring?”. A word or phrase is vague whenever it has fuzzy boundaries of application. For instance, the phrase “unreasonable conduct” is vague because, although there are paradigmatic cases we can all agree upon, there are many uncertain or borderline cases. Legal texts are frequently vague and ambiguous.²⁸

Barnett claims that, except in cases of irreducible ambiguity, context is naturally and uncontroversially part of how we determine the meaning of ambiguous terms. For instance, the phrase “right to bear arms” in the Second Amendment to the U.S. Constitution is ambiguous since the word “arms” has multiple meanings, but by appealing to the context in which the text was produced it becomes clear what the meaning actually *is*.²⁹ Thus, contextual factors enrich the communicated meaning of the text in this case. In contrast to this, vagueness is never resolved by appeal to context. A vague term remains vague, no matter what the context is. Referring to the examples of “unreasonable searches and seizures” and “cruel and unusual punishments”, both of which are proscribed by U.S. Constitution, Barnett comments:

*“Deciding whether a particular punishment is “cruel and unusual” or a particular search is “unreasonable” requires more than the original public meaning of the term. To the extent that these terms are vague, they inevitably require constitutional construction based on noninterpretive considerations when being applied to a particular practice”.*³⁰

This suggests an alternative test for enrichment:

Barnett’s Standard for Enrichment: When a term is ambiguous, contextual factors can enrich its meaning; when a term is vague, they cannot and its scope of application must be determined by non-semantic criteria.

Elsewhere in his work, Barnett explicitly endorses the notion that the non-semantic criteria that apply in the case of vagueness are moral and political in nature, arguing that a rights-based theory of justice³¹ does the necessary work.

²⁸ Indeed, it can be argued that virtually every concept of importance is vague. This is the basis for the infamous Sorites paradox. See Kramer, M. “When is there not a right answer” (2008) 53(1) *American Journal of Jurisprudence* 49-68

²⁹ Barnett uses the example in both (n 26) and (n 8)

³⁰ Barnett (n 26), p. 635.

³¹ Barnett (n 26), p. 642 onwards.

The problem with Barnett's alternative standard is that not even he believes it. In reality, his view collapses into the common knowledge standard. We see this in the first instance in his acknowledgement of "irreducibly ambiguous" terms. Here, he appeals directly to the work of Solum, who, as we have just seen, is a proponent of the common knowledge standard. It is no surprise then to learn that irreducibly ambiguous terms arise, for Solum, when there is a lack of common knowledge as to which of the two or more possible meanings was supposed to apply.

Worse than this, however, is Barnett's acceptance of "allegedly vague terms"³². These are terms which initially appear to be vague but actually have much more precise boundaries of application. His go-to example of this is the unenumerated rights provision of the Ninth Amendment.³³ The existence of unenumerated rights is semantically encoded into the text of that amendment, referring as it does to "certain rights" that are not denied or disparaged by other provisions in the US constitution. The concept of "rights" is, *prima facie*, vague and could encompass a great number of privileges and protections. It might seem then, following Barnett's standard, that the text needs to be constructed using moral and political criteria, not enriched using contextual and historical factors, if we are ever to bring some precision to its boundaries of application.

But Barnett argues that this is wrong. Using a wealth of historical sources and evidence, Barnett presents a case for a less fuzzy interpretation of the Ninth Amendment.³⁴ Specifically, he says that in the pragmatic context in which the text was produced, the phrase "rights retained by the people" meant "natural liberty rights". Of course, the class of natural liberty rights is still somewhat vague, but it's much less vague than what we might initially have thought. Furthermore, Barnett maintains that this argument is a linguistic/semantic one, based on what the implicated content of the Ninth Amendment actually is given the pragmatic context of its production; it is not a moral/political argument based on some preferred or optimal conception of rights.³⁵ Thus, in acknowledging the possibility of allegedly vague terms, Barnett has made a decisive move in favour of the common knowledge standard. For him, common

³² Barnett (n 26), p. 635.

³³ Barnett "The Ninth Amendment: It Means What it Says" (2006) 85(1) *Texas Law Review* 1-82

³⁴ This is the argument in Barnett (n 33)

³⁵ Barnett (n 33); and Barnett (n 26), pp 623-624

knowledge of the limited scope of the term “rights” in the historical context in which the US constitution was produced enriches the textual meaning.

Admittedly, I have not provided a complete defence of the common knowledge thesis in this section. Nevertheless, when you combine its obvious appeal as an empirically and historically-based standard, with the fact that even those who seem to resist it, end up stumbling into it, you see begin to see why I think most originalists will adopt this thesis. The question is whether they are right to do so.

4. The Anti-Common Knowledge Thesis

The answer must be “no”: the common knowledge standard, despite its appeal is ill-suited to the constitutional setting. This is because the strategic context in which legal speech is produced, in combination with the unbounded nature of the legal conversation, typically serves to block the route to common knowledge. This is particularly so in relation to those ambiguous and vague constitutional provisions that cause so much trouble, and which thick originalists seek to constrain by the appeal to historical contextual factors. This gives us the *Anti-CK Thesis*.

An argument of this sort has been made by others.³⁶ My aim in this section is to refine, clarify, push the implications of this argument, and offer some novel support for certain aspects of it. I will do this in two stages. First, I’ll give a quick overview of Andrei Marmor’s argument for the anti-CK thesis, refining certain aspects of it along the way. Second, I’ll present my own twist on the argument, explaining why the strategic and unbounded nature of the constitutional conversation blocks the route to common knowledge. In doing so, I shall appeal to Pinker, Novak, and Lee’s theory of the strategic speaker. This argument lays the foundation for the defence of the Thinness Thesis in the final section.

It is important to be clear at the outset. The argument I present here is solely concerned with the common knowledge of enriched content, and not with common knowledge of other features of the constitutional text. I accept, at a minimum, that there

³⁶ Poggi (n 14) and Marmor, A. “The Pragmatics of Legal Language” (2008) 21(4) *Ratio Juris* 423-452; “Can the law imply more than it says?” in Marmor, A. and Soames, S. *Philosophical Foundations of Language in the Law* (Oxford: OUP, 2011); and “Meaning and Belief in Constitutional Interpretation” (2013) 82(2) *Fordham Law Review* 577-596.

is common knowledge of the text itself. That seems obvious. Indeed, the fact that there is common knowledge of the text, but not necessarily of the enriched content, is part of the foundation for the Thinness Thesis I defend in the final section. Similarly, although I argue against common knowledge of enriched content, I don't mean to rule it out *tout court*. I merely intend to argue that the scope for CK-enriched content is extremely narrow in the constitutional context, much narrower than thick originalists tend to suppose.³⁷

4.1 - Marmor's Failure Argument: A First Pass

Marmor has argued that there are important differences between the legal and ordinary conversational contexts that render pragmatic enrichment a good deal more controversial in the legal case. I call this his "Failure Argument" since it is based on the notion that certain conditions, satisfied in the ordinary conversational context, fail to be satisfied in the legal context.³⁸ The argument runs like this:³⁹

Failure Argument

(4) The uncontroversiality of pragmatic enrichment in the ordinary conversational context typically depends on three conditions being satisfied:

- (a) There is a speaker (or speakers) with a certain communicative intention.
- (b) There is a conversational context that is, to at least some extent, common knowledge, between speaker and listener.
- (c) There are agreed upon conversational norms that govern the relevant speech situation (specifically: Grice's cooperative norms)

(5) Conditions (a) - c) are not easily satisfied in the legal context:

- (a) There is rarely a speaker or speakers with clearly identifiable communicative intentions.
- (b) The conversational context is vague and indeterminate.
- (c) Legal texts are produced in strategic, not cooperative circumstances.

(6) Therefore, pragmatic enrichment in the legal context is less likely to be uncontroversial.

³⁷ I am indebted to an anonymous reviewer for pushing this clarification.

³⁸ Marmor 2008 (n 37) and 2011 (n 37)

³⁹ This is my reconstruction. I think it is a fair representation of his reasoning.

For present purposes, I pass no comment on the merits of premise (4). There are probably good reasons for thinking that these three conditions make enrichment uncontroversial in the ordinary conversational context, but I won't get into them here. I simply assume that the premise is true. My interest is in the merits of premise (5). Before getting into that premise, however, I want to note how the conclusion to the argument as a whole is relatively modest. Marmor is not claiming that no legal text can ever be pragmatically enriched, only that this is not a straightforward process. More precisely, he is claiming that the difficulty in satisfying these three conditions means that the debate about the communicated content of particular legal provisions tends to reduce to a moral/political debate. We'll see why he makes this claim in more detail in section 5. In the interim, let us turn to premise (5): is it really true that conditions (a)-(c) are difficult to satisfy in the legal context?

We start with condition (a). Marmor's complaint is a common one. As mentioned earlier, it is very difficult to locate and identify the intention behind a legal text. Legal texts are produced and approved by many people, with many different intentions. So if a speaker's intention is one of the things that makes enrichment easy in the ordinary conversational context, there is less reason for optimism in the legal context. Still, even Marmor accepts that it is possible for there to be collective intentions, and so condition (a) is not an insuperable bar to enrichment.

I support this moderated view, and, indeed, I think a stronger argument against premise 5(a) is possible. I would submit that even if individual or collective intentions cannot be associated with the legal text, the text itself must be interpreted from a teleological stance.⁴⁰ In other words, even if there are no intentions, there must be *functions* or *roles* that those texts fulfill and this will tend to have a similarly enriching effect to intentions. Consider another analogy.⁴¹ There is a sign on a gate. It says "No entry". Clearly, the sign has some purpose. When determining its communicative content, that purpose must be factored in, even if no specific speaker's intention can be found.

⁴⁰ This could be supported with Dennett's idea that systems can be understood from one of three different stances (*physical*, *design* and *intentional*), depending on their characteristics. For those familiar with Dennett's framework what I'm suggesting here is that legal texts must be understood from the design stance, even if they cannot be understood from the intentional stance. I don't push this point in the text as it would take further elaboration, but it may enhance the appeal of the argument for some. Dennett, D. "Three Kinds of Intentional Psychology" in Dennett, D. *The Intentional Stance* (Cambridge, MA: MIT Press, 1987)

⁴¹ Analogies of this sort are quite popular in the debate over meaning and legal interpretation, e.g. Berman, M. "Originalism is Bunk" (2009) 84 *New York University Law Review* 1

As a rebuttal to this, one could argue that the purpose is clearly encoded into the sign, and so no “enrichment” is really required in this instance. But that’s not obviously true: assumptions about the pragmatic context of the sign are in fact needed to make the interpretation. For instance, one must assume the sign was not put there as a practical joke and so should be read, sincerely, as a directive barring entry to the property. This is true, *a fortiori*, for legal texts, which are conventionally assumed (though this has been recently contested) to be directives or other kinds of speech act (to be discussed below), rather than exercises in irony. They must be interpreted with this functional role or *telos* in mind, and this will have a similar effect to assuming that they are the product of a specific speaker’s intentions. This argument echoes the one made by Raz about the fact that legal texts must be taken to be expressions of someone’s judgments about the reasons for doing or forbearing from some activity,⁴² if they are to claim authority. Thus, I think it is fair to say that legal texts *must* be viewed as having some sort of (ultimately action-guiding) purpose, and this in turn must be intimately tied to the pragmatic properties of those texts. (This becomes more significant when discussing the Thinness Thesis).

Turning to condition (b), the problem identified by Marmor is that the analogy between the production and interpretation of a legal text, and the production and interpretation of utterances in a conversation, breaks down in numerous respects. Who is the speaker and who is the listener to a legal text? Is it the legislature voting to approve the language, the public at large or some special subset of individuals such as government officials or judges? The answer makes some difference since exactly who is singled out as forming the class of listeners or speakers will determine what the conversational context is, and which aspects of it can be common knowledge between the participants. Marmor complains that the context is fuzzy and indeterminate in the case of legal conversations. Indeed, there are often at least two conversations going on in the case of a legal text: (i) the intra-legislature or intra-ratifier conversation, *i.e.* the conversation between the people who produce and vote upon the text itself; and (ii) the legislature-courts/public conversation, *i.e.* the conversation between the producers and ratifiers and the people to whom the text applies. The existence of that second conversation is particularly problematic since it contains no precise, neatly-

⁴² See Raz, J. “Authority, Law and Morality” (1985) 68(3) *The Monist* 295. Note, this glosses over the fact that some fragments of a legal text may only be indirectly reason-giving.

circumscribed group of listeners; instead, it contains an indefinite, and oftentimes temporally distant group. It is very difficult to see how there could be common knowledge of contextual factors in this conversational context.

Still, as with the first condition, Marmor accepts that there may be some agreement about some aspects of the conversational context, and these could be common knowledge. There is some sense to this. Whatever the concerns one might have about contextual indeterminacy, in practice most legal texts tend to have some reasonably determinate contextual features that are known to people. Constitutional texts are not pure “messages-in-a-bottle”. We have some knowledge about their production, and this knowledge has been in the public domain. But whether this knowledge meets the precise conditions for common knowledge is something I am much more dubious about, as I shall explain below.

That brings us to condition (c), which Marmor argues is the major problem in the legal context. In ordinary conversational exchanges, both speaker and listener *tend* to abide by Grice’s cooperative norms. In other words, they generally want to be understood and want to understand each other. Thus, they naturally enrich the content of what is said, filling in the presuppositions and implying content not expressly stated, when that is necessary for being understood. They may occasionally get things wrong, but the cooperative spirit of the conversation will allow them to correct such errors through the normal back-and-forth between conversational partners. The problem is that legal texts are not produced under similarly cooperative conditions. Quite the opposite in fact. They are typically produced under conditions of strategic conflict. This leads to texts which are the product of compromise, and might easily be taken to imply different things by different sets of interests. This weakens the likelihood of pragmatic enrichment.

Marmor briefly considers the possibility⁴³ that alternative, non-cooperative norms govern this production of legal texts, and that these norms might allow for enriched communicative content à la Grice’s norms, but argues that any set of such norms would invoke a thick political/moral conception of the law. Hence, the debate would reduce to being a political/normative one. This would undermine the alleged factuality of interpretation, beloved by certain originalists.

⁴³ Marmor 2008 (n 36)

With the exception of this final claim -- which I return to in section 5 -- I think Marmor is exactly right about this. Legal texts are produced in strategic contexts, not just contexts involving conflicts among the original drafters and ratifiers, but ones involving an unknown future set of legal subjects and actors. I think this is what really helps to explain why the common knowledge standard for enrichment, so beloved by the thick originalists, has limited scope. In essence, I think that premises (5b) and (5c) are linked in important ways: the strategic context makes mutual knowledge possible, but not common knowledge. Let me develop this argument in more detail.

4.2 - Strategic Speech Situations and the Route to Common Knowledge

The argument I wish to defend claims that whenever an utterance admits of more than one possible interpretation (i.e. whenever an utterance is at least minimally vague or ambiguous and would need some degree of enrichment to reduce the scope of that vagueness or ambiguity), then the mere possibility that the participants in the conversation in which that utterance is made have (or could have) competing or conflicting views about the enrichment of those provisions serves to block the route to common knowledge. This is nearly always the case with constitutional utterances because they are made in conversational contexts involving an unknown and temporally boundless set of participants. Consequently, it follows that common knowledge of enriched content is rare, if not impossible, in the constitutional context.

To develop this argument in full, a brief divagation is required into Pinker, Nowak and Lee's (PNL's) theory of strategic speech.⁴⁴ PNL's theory is a scientific-empirical one, not a normative one. They are not concerned with how language *ought* to be interpreted, but rather with how it is interpreted. This makes it an ideal reference point for the discussion in this article. One of PNL's key observations is that, contrary to Grice and others, ordinary conversations often include strategic elements. Take one of PNL's favourite examples: A man and woman go out on a date. The man brings the woman back to his apartment building and asks her if she would like to come up and see his etchings. Although this question has an obvious conventional semantic meaning, it also has an implied (enriched) one. It is an implied sexual come-on, widely-known to

⁴⁴ Pinker, S., Nowak, M. and Lee, J. "The Logic of Indirect Speech" (2008) 105 *Proceedings of the National Academy of Sciences* 833-838

be such, but still implied in character rather than explicit.⁴⁵ In this manner, it is no different from implied threats or bribes, or other implicature-laced utterances used by people in a wide variety of contexts. Why do people use such utterances, and how is it that they work?

PNL argue that people use these types of utterance for a variety of strategic reasons. In many conversational contexts, one doesn't know whether one's conversational partner is, to put it bluntly, a "friend" or "foe", *i.e.* a willing cooperator or an unwilling competitor. The maitre'd at the restaurant might be willing to accept one's bribe, or he might not be. How can you safely offer a bribe without presuming him to be one or the other? The answer is to use an implied bribe, one that grants plausible deniability should the maitre'd be offended or disconcerted by the offer. The same is true in the case of the young man and the young lady. He doesn't know whether she would be a willing sexual partner or not, so he saves face by asking her implicitly rather than explicitly.

Granting these motivations, how do indirect sexual come-ons, bribes and threats work? How is it that they can be exploited by strategic actors in different conversational contexts? After all, the kinds of phraseology used are often obvious in their implied meanings. PNL submit that the answer lies in two related facts, one psychological, one conceptual.

The psychological fact is that language is perceived to be, and operated as, a digital medium. Thus, for example, phenomena that are continuous in the real world (e.g. space and time) are digitised by language (e.g. "a moment in time"), resulting in a communicated meaning that is discrete and discontinuous.⁴⁶ That's not to say there aren't shades of meaning, it's just to say that people generally perceive language to have this digitising power. Thus, when a phrase is used that may or may not have an implied meaning, it is usually perceived as either having that meaning or not.

⁴⁵ Sometimes phrases with one conventional meaning acquire another one through persistent use. This would make the implied meaning an explicit conventional one, coded directly into the text. This might happen (or indeed have happened) to the "come up and see my etchings example". That possibility doesn't affect the overall argument being made here, however. The argument is not about the specific example, but about the phenomenon of implied/indirect speech acts in general.

⁴⁶ Pinker, S. *The Stuff of Thought* (New York: Viking, 2007) gives many examples.

The conceptual fact concerns the difference between *common knowledge* and *mutual knowledge*. As defined earlier, a fact C is common knowledge between S1 and S2 when: S1 knows C and S2 knows C; S1 knows that S2 knows C and S1 knows that S2 knows C; S1 knows that S2 knows that S1 knows C, and so on *ad infinitum*. Of course, it is not possible for the human mind to encode infinite levels of knowledge, so the presence of common knowledge is likely to be cognitively encoded by a *recursive rule or formula*. By comparison, a fact C is mutual knowledge between S1 and S2 when they both know that C, but they are unsure of what the other party knows. In other words, in circumstances of mutual knowledge there isn't the same iterative and regressive knowledge of the propositions known by the other party, there is just knowledge of the same proposition.⁴⁷

The key point for PNL is that strategic speech situations (i.e. speech situations in which one's conversational partner is not known to be a "friend" or "foe") often block the route to common knowledge. PNL's argument is that when one has an utterance with more than one possible interpretation – e.g. one based solely on the explicitly encoded meaning, and another based on implied/enriched meaning – the explicit meaning may meet the conditions necessary for common knowledge, but the implied meaning usually will not. This is because of the unknown competing interests and desires at stake. Thus, when the young man says to the young woman "would you like to come up and see my etchings", he may know the implied meaning, and she may know the implied meaning, but because she could be a friend or foe, he doesn't know for sure that she knows the implied meaning; and she doesn't know for sure that he knows that she knows the implied meaning; and so on. The route to common knowledge is blocked. This gives the parties plausible deniability. The man can argue he wasn't trying a sexual come-on, and the woman can ignore the implication.⁴⁸

This argument applies equally well to other strategic speech situations, and particularly to cases in which the language used is vague or ambiguous. This obviously covers the legal speech situations of interest in this article. When there are competing aims and interests, and a constitutional text with an explicitly vague or ambiguous meaning and a more constrained or unambiguous enriched meaning, then the parties to

⁴⁷ Thomas, DeScioli, Haque and Pinker provide a detailed discussion and experimental test of the cognitive encoding of common knowledge in 'The Psychology of Coordination and Common Knowledge' (2014) 107 *Journal of Personality and Social Psychology* 657-676.

⁴⁸ There is empirical support for this argument in Lee and Pinker 'Rationales for indirect speech: The Theory of the Strategic Speaker' (2010) 117(3) *Psychological Review* 785-807.

the legal conversation may have common knowledge of the explicit wording, but will typically only have mutual knowledge of the enriched meaning. Indeed, the argument is even more forceful in the legal context. In an ordinary conversation, such as the one between the man and woman in the previous paragraph, both participants are present at the same time and exchange utterances in a temporally limited frame. Although it may, of course, be difficult to know the mind of the other person in such a context, there are still shared signals that could make this possible. In a legal conversation, this is no longer true. The conversational partners of the original ratifiers of a text are an unknown and temporally diffuse group. They may be “hearing” the text in a radically different social, political and economic context, one in which different desires or values influence what they would like to get from the constitutional text. The original drafters/ratifiers don’t know whether the future interpreters will be “friends” or “foes”, and vice versa.

To give an example, a constitutional text may explicitly grant the executive the “power to raise taxes”. In the original historical context, the enriched meaning of this provision may have limited the power to the taxing of incomes only (and not, say, consumption or capital). The original ratifiers may have felt that everyone shared a commitment to this enriched meaning at the time. But the explicit (and vague) provision has been communicated to a diffuse and unknown audience, many of whom cannot be known to share that commitment. And so because the original drafters could not know for sure that the future interpreters are “friends” or “foes” of this enriched meaning, it cannot be assumed that there is common knowledge of that enriched meaning. The future interpreters have plausible deniability. The situation is somewhat analogous to that of the man and the woman, only the lack of a shared context is more pronounced.

Some may worry that this argument overstates the strategic nature of legal conversations.⁴⁹ They may argue that constitutional texts are often drafted using widely shared commitments and values, not ones over which there is strategic bickering. They could argue that the texts are drafted in contexts in which nearly everyone is a friend, not a foe. But this is to misunderstand the argument I am making. There could very well be widely shared commitments in particular historical contexts. My point is simply that legal conversations do not take place *in particular historical contexts*. They are, instead, temporally extended (in most cases indefinitely so). While at any one historical moment there may be widely-shared values (ones that would affect enriched meaning) the

⁴⁹ I would like to thank an anonymous reviewer for drawing my attention to this objection.

commitments and values of those participating in the conversation at future moments are unknown and, arguably, unknowable. This uncertainty always adds a strategic element to legal conversations. We are all familiar with this notion since we are all involved in such strategic relationships with our future selves. For instance, I may (right now) be committed to giving up smoking. But my future self (later this evening) may not share this commitment. Consequently, there is a strategic element to my relationship with myself over extended periods time. I am merely claiming that the same thing is true of the relationship between the participants in a legal conversation.

Now, to be clear, that is not to say that there is never any common knowledge in legal speech situations. The argument accepts, at a minimum, that there can always be common knowledge of explicit meaning. But it is to say that common knowledge of enriched meaning is extremely elusive, even when the restriction seems blindingly obvious in a given historical context. Thus, for instance, someone like Barnett can argue that “rights” obviously meant “natural liberty rights” at the time of its adoption, and we can agree that the implied meaning may have been shared between the parties at the time, but this still does not mean that there is common knowledge of enriched meaning amongst all the participants in the legal conversation.

If this is right, premises 5(b) and 5(c) of the Failure Argument are intimately linked. The lack of common knowledge is a product of the strategic nature of legal conversations; and the indefinite boundaries of legal conversation is part of what makes them so strategic. This significantly undermines the credibility of the common knowledge standard for enrichment. Whither then enrichment and whither then originalism?

5. The Thinness Thesis

This final section defends the thin approach to originalism. According to this approach, although communicated content is fixed at a historical moment, it is only enriched to a minimal degree (and maybe oftentimes not at all). More precisely it holds that the constitution, particularly in the case of vague or ambiguous power-conferring and rights-protective provisions, fixes very broad and abstract principles that are then to

be fleshed out using moral/political desiderata at a later date.⁵⁰ Fixity isn't completely undermined by this view, but its relevance is significantly curtailed, making it a somewhat unorthodox form of originalism.

Although this view can be defended on moral/political grounds (as, for instance, Balkin defends it), I believe that a linguistic set of criteria can also do the trick. I believe this for two main reasons. First, because I think it follows from the theses advanced in the preceding sections, in particular the *Anti-CK Thesis*. Second, because I think it follows from a commonsensical understanding of the role and function of constitutional speech acts, particularly when such speech acts are considered from the unique perspective of the constitutional conversation and the typical participant in that conversation.

5.1 - An Argument for Thinness

To start, we need to bring a little more clarity to the notion of thin originalism. John Perry's discussion of different forms of textualism is instructive in this regard.⁵¹ Textualism is the view that the content of a legal text is determined by the objective (*i.e.* conventional) meaning of the language used. Textualism is broader than originalism insofar as it applies to all kinds of legal texts, but Perry's comments are easily adapted to the present context.

Perry notes that there are two types of textualism: meaning-textualism and conception-textualism. According to the former, the conventional meaning alone determines the scope and content of a legal provision; according to the latter, shared or mutually known beliefs about the scope and content form part of the objective meaning. Perry illustrates the difference with the example of a philosophy department agreeing that "philosophical talent" will be the main criterion they use in hiring decisions. The members of the department have lots of mutually known beliefs (*i.e.* conceptions) about what that talent consists in. For example, they think it consists in analytical rigour, logical sharpness, technical sophistication, novelty of insight and so on. According to meaning-textualism, these particular beliefs do not form part of the communicative

⁵⁰ This is essentially the view of Dworkin, Balkin and possibly also Michael Moore. Dworkin and Moore incorporate within this a realist view of moral semantics (*i.e.* moral terms pick out real existent moral entities and properties, which we can discover through sound reasoning). I remain agnostic about this latter claim here. I don't believe that anything I say presupposes a particular conception of moral ontology. Indeed, a constructivist, anti-realist moral ontology would appear to be compatible with my argument.

⁵¹ Perry, J. "Textualism and the Discovery of Rights" in Marmor, A. and Soames, S. *Philosophical Foundations of Language in the Law* (Oxford: OUP, 2011)

content of “philosophical rigour”. Beliefs about the precise constituents of philosophical talent can change over the years, and thus alter how the criterion is applied. This is fine: only the most general level of meaning is communicated by the original agreement on the criterion. Conception-textualism, of course, denies this, holding that the mutually known conceptions of philosophical rigour are part of its communicative content.

Meaning-textualism supplies the essence of the thinness thesis. The thesis claims that, when dealing with constitutional provisions, such as those that acknowledge an undefined class of “rights”, or those that confer an “executive power”, only the most general, abstract sense of those provisions is fixed and communicated by the constitutional text. In other words, the constitutional text is enriched to the minimal degree (required by fixation). The conventional linguistic rules and practices might get added-in, along with some assumptions about the nature of the speech acts being performed through the constitutional text, but not any particular mutually known conceptions.

There are extant linguistic arguments for the thin view of meaning. Perry, for instance, holds that conception-textualism is “totally implausible” because it applies to legal utterances a standard that is not applied in linguistic philosophy.⁵² Similarly, Dworkin argues that the use of abstract language as opposed to conception-specific language is clear evidence that the communicative intent was abstract, not conception-specific. Both of these arguments have their problems. Dworkin’s relies on the difficult notion of intention in legal communication, and Perry’s arguably overstates the dominant view in linguistic philosophy.⁵³ In my view, it is really the uniqueness of the legal conversation that creates the problems for conception-textualism and supports the thin view of meaning. With this in mind, I want to present an alternative linguistic argument for the thin view of constitutional meaning.

The argument relies on the notion that legal texts must be understood from a purposive or teleological perspective—a notion I introduced in the previous section. As I noted then, it would seem difficult to deny that legal texts have a pragmatically-indexed teleology: that they are produced in order to do certain things through the medium of words. To dress this up in the more common philosophical garb, the

⁵² In other words, Perry holds that the legal view of meaning must be supported by the accepted tools of modern philosophy of language. See Perry, J. (n 50) p. 106 and Asgeirsson (n 1) on this point.

⁵³ Marmor 2013 (n 37) for both arguments.

constitution is naturally viewed as a bundle of *speech acts*. Speech acts are ways of doing things with words, and are usually broken down into two main components: (a) propositional content; and (b) illocutionary force.⁵⁴ The former is what the words are *about* (the objects, events and states of affairs in the world or in the speakers' mind), whereas the latter is what the words are designed to accomplish. Take the "please close all doors!" example from earlier. In terms of content, this utterance was about the doors in the room, but in terms of illocutionary force the utterance was designed to accomplish a certain goal: to get you close the doors.⁵⁵ Whether the utterance actually gets you do so is another matter (one related to the so-called "perlocutionary" force of the speech act).⁵⁶

Speech acts come in a variety of forms, but the three most commonly present in constitutional texts are: *declaratives*, *directives* and *commissives*. A declarative creates a new object or entity; a directive encourages people to act in particular ways; and a commissive commits people or institutions to particular kinds of action. Constitutions declare that certain institutions exist, and then direct and commit those institutions to particular kinds of action. For instance, the U.S. constitution creates institutions of governance, directs them to perform certain functions, and commits them to respecting and upholding certain rights. Directives and commissives are the more interesting and troubling examples for originalist theories of meaning because they tend not to have merely stipulative meanings. Instead, they appeal to generally understood concepts and principles. Originalists try to flesh out these concepts and principles by appealing to particular historical conceptions of their meaning. For this reason, my argument will focus on these two types of speech act alone. My starting presumption is that it is difficult to deny that constitutional texts performs these two kinds of speech act. I don't have a formal argument for this presumption; I simply think it is intuitively compelling: that constitutional texts perform speech acts seems as obvious as the fact that a sign on a gate saying "no entry" performs a speech act. Indeed, I cannot imagine what a constitutional text could otherwise be taken to be. Nevertheless, I have to admit that there are those that disagree with this view, deeming it to be a contestable "standard picture". I cannot fully engage with the views of the dissenters in this article, but I

⁵⁴ Green "Speech Acts" (2007) in *Stanford Online Encyclopedia of Philosophy*, available at <http://plato.stanford.edu/entries/speech-acts/> (accessed 31/7/14)

⁵⁵ Searle, J. and Vanderveken, D. break illocutionary force up into several components. See their *Foundations of Illocutionary Logic* (Cambridge: Cambridge University Press, 1985).

⁵⁶ I am indebted to an anonymous reviewer for encouraging me to clarify this point.

would like to suggest that there are interesting ways in which the argument I make for thinness could to help reconcile our competing views.⁵⁷

If this starting presumption is granted, the main argument can proceed. It is based on three additional claims. First, that constitutional speech acts have certain conditions of success associated with them, such that if the constitution purports to perform such speech acts it must meet those conditions of success; second, in purporting to successfully perform those various speech acts, the constitutional text could either be thickly or thinly enriched; and third that certain linguistic properties of the constitutional text and the constitutional conversation make thin enrichment the more plausible option. Consequently, thin originalism is the most linguistically plausible form of originalism. To state this more formally:

The Speech Act Argument for Thinness

(7) Constitutions purport to perform speech acts, in particular they purport to perform directives and commissives.

(8) In purporting to perform such speech acts, constitutional texts hold themselves out as providing decisive reasons for action, i.e reasons for complying with some directive or committing to some principle (in short: constitutions purport to successfully perform those speech acts).

(9) In purporting to successfully perform such speech acts, constitutions could (a) be thickly enriched with specific historical conceptions of the reasons for doing or forbearing from certain acts; or (b) be thinly enriched, i.e. not dependent on particular historical conceptions of the reasons for doing or forbearing from certain acts.

(10) It is more linguistically plausible to assume that (b) is true than that (a) is true (due to the nature of the constitutional conversation).

(11) Therefore, thin originalism is the more linguistically plausible option.

⁵⁷ Those who offer correctives to the standard picture include Mark Greenberg and Nicos Stavropoulos. Greenberg, in fact, coined the term “standard picture”. In Greenberg, M., ‘Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication’ in A. Marmor and S. Soames (eds.), *Philosophical Foundations of Language in Law* (Oxford: OUP, 2011) he pushes the view that legal communication is so divorced from other, everyday, forms of communication, that the focus on purely linguistic considerations and communicated content may be misguided in the legal context. In effect, I am making a very similar type of argument. Only I think it is the linguistic considerations – specifically the nature of constitutional speech acts – that drives this conclusion. In my view, it is still right to think of the constitution as consisting in bundles of speech acts, but it is important to note that they are very odd, curiously contentless, speech acts. I offer further reasons for thinking that the views can be reconciled in [X]

Let me briefly elaborate on the key premises of this argument before turning to some more substantive critiques. To start with, I would simply re-emphasise that, for me, premise (7) is intuitively compelling, despite the fact that some may object to it.

With respect to premise (8), one of the key developments in speech act theory has been the identification of the success conditions associated with the different kinds of speech act.⁵⁸ And one of the key insights of this development is that directive and commissive speech acts, in order to be successful, presume the presence of reasons for doing or forbearing from certain types of act. The strength of those reasons varies with the sub-type of directive or commissive. To focus on directives for now,⁵⁹ a *request* is a weak form of directive. If I request you to close the door, the request simply requires you to have *a* reason for closing the door, one that competes and may be overborne by other reasons you have. Stronger directives are not like this. If I *demand* or *command* you to do something, the presumption is that you will have a *decisive* reason for doing what I command you to do. For example, if we are travelling in a moving car, and the door suddenly swings open, and I then tell you that you must close the door, I cannot merely be suggesting that you have *some* reason to close the door; I must be suggesting that you have an overwhelming reason to do so, that door-closing is non-optional for you in this conversational context. The point here is that the directives and commissives that are most plausibly performed by constitutional texts are of the strongest sort: they presume that decisive reasons for action are present. And, in the case of vague or ambiguous speech acts, these reasons are routinely used by interpreters to figure out exactly what it is they are supposed to do.

Success conditions are not equivalent to conditions for non-defectiveness, though they are related. A speech act can be successful, (i.e. can *purport* to be a demand backed up by decisive reasons), whilst at the same time being defective, (i.e. not be backed up by genuinely decisive reasons). For example, I could demand that you pick up my dry-cleaning because I think you owe me a favour, but you may feel that you have decisive reason to do something else. To claim that a demand or commissive is successful is merely to claim that it purports to be backed up by decisive reasons; to claim that it is non-defective is to go a step further and claim that it is actually backed up by such

⁵⁸ Alston provides maybe the most exhaustive account in his book *Illocutionary Acts and Sentence Meaning* (New York: Cornell University Press, 2001).

⁵⁹ The commissive case is identical.

reasons. This distinction between success and defectiveness becomes important in relation to premise (10), below.

This brings us to premise (9). This should be relatively uncontroversial since it simply sets-up a disjunctive syllogism pitting the two types of originalism against each other. One could challenge this on the grounds that originalism is not the only interpretive possibility, and I would agree, but that challenge should not affect the present dialectic. My goal in this article is not to show that thin originalism is the best possible interpretive theory; it is merely to show that it is the most plausible form of originalism.

Premise (10) is the most controversial. My initial defence (I address further objections below) focuses on the unusual features of the constitutional conversation and the participants in that conversation. These have been noted already. First, there is the fact that constitutional speech acts tend not to be the product of a discernible intention which could be backed up by a specific set of reasons for action. Second, there is the fact that the conversation in which these speech acts are made is abstractly ahistorical. To be sure, the speech acts originate at a particular historical moment, but they are not deeply grounded in that moment like everyday conversational speech acts. Instead, they extend over indefinite temporal (and perhaps cultural boundaries). To tie those speech acts to a particular historical set of reasons for action (possessed by one set of speakers/hearers to the text) would be out of character with these other linguistic properties of the constitutional conversation. Hence, if the constitution is performing directive and commissive speech acts it is most plausibly viewed as not performing ones that are deeply grounded in particular historical conceptions of what those speech act may entail. Finally, and allied to this, there is the fact that for the typical interpreters of the constitutional text – i.e. the judges and officials whose interpretations are authorized by the text itself – there will be built in pressures to avoid particular historical conceptions of the reasons for action associated with constitutional speech acts. If some particular historical conception of the decisive reasons underlying such a provision is allowed to enrich the meaning at all times and all places, the constitutional speech act will fail. This is because that particular conception of the reasons may be flawed or fail to be compelling to the indefinitely extended pool of potential readers. This is something that cannot be assumed by the typical official constitutional interpreter (e.g. judge or other legal official). The legitimacy of their very roles

presupposes the legitimacy of the constitutional order. Consequently, and factoring in this perpetual and indefinitely extended class of interpreters, the thinly enriched view of meaning is the most plausible one to assume. To be clear, this is not simply because it is morally desirable for the future interpreters to adopt varying interpretations. It is because, for them, given the nature of the constitutional conversation, and their role within that conversation, the thin view of the speech act most plausible. This is the essence of the argument I wish to make.

I will readily admit that this argument is a little strange, with some initial reactions likely to be that it is in fact a moral argument, not a linguistic argument. Indeed, there are at least four objections to it that must be addressed before it becomes more fully plausible. I turn to those objections now.

5.2 - The argument is not linguistic since it presupposes “successful” speech acts

One major concern about the argument is its reference to conditions of “success”. As you’ll recall, one of the goals of this discussion was to see how far purely linguistic factors can be pushed in the debate over constitutional meaning. This is in keeping with the allegedly factual core of originalism. But this reference to “successful” speech acts might seem to many to tip us over into moral/normative territory.

This objection is misconceived. While the argument is indeed a functionalist one, based on claims about the functions of speech acts within the constitutional conversation, it is not a surreptitiously moral one. It is claiming that, as a matter of fact, constitutions perform certain functions and that thinness is needed if they are to perform that function. It is not claiming that thinness is morally preferable or that the constitution is actually successful in performing those functions (though it may be both). After all, it could very well be that the abstract boundaries set by the constitution are morally problematic, and hence no decisive reason exists for acting within those boundaries. In that case, the constitution will fail to perform its function. But this has nothing to do with the functionalist claim underlying the argument: the boundaries are still thin because that is what is required for them to purport to fulfill their role.

Furthermore, as is emphasized in the argument itself, it is particularly true that, from a certain perspective, constitutions will be presumed to consist in non-defective speech acts. The constitutional “insider” (e.g. the judge or legal official who has sworn

an oath to uphold the constitution, and whose very role depends on the legitimacy of the constitutional order) will generally be committed to the non-defectiveness of the constitution. They will certainly be reassured that constitutional speech acts are only thinly enriched. But, again, that does not make the claim about thin enrichment a surreptitiously moral one. The claim is about how constitutional speech acts are most plausibly conceived to work in a constitutional conversational context which factors in the perpetual presence of such a class of interpreters. It is not about how they ought to be interpreted and applied. It is still possible, according to my view, for the constitutional insider to find that the constitutional speech act fails (that the abstract boundaries supply no decisive reasons for obedience).

One might worry here that by acknowledging the possibility of failure I destroy the argument for thinness. If thinness implies that the constitution is vulnerable in this manner, then why would anyone endorse it? But this is also to misunderstand the nature of my defence of thinness. I am not claiming that thinness supplies an optimal or morally preferable theory of constitutional communication. I am merely claiming that it is the most linguistically plausible one, given the nature of constitutional speech acts within the constitutional conversation. If the constitution fails, so be it. That is a moral or practical problem, not a linguistic one.

5.3 - The argument does away with fixity and hence is not truly originalist

Another criticism comes from the thick originalist. This one claims that by only endorsing a thin view of meaning, we dilute the fixation thesis to the point of absurdity. If the claim is that the constitutional text communicates general and abstract boundaries, and that the reasons for supporting those boundaries can shift over time, then in what sense is there any fixity? If we are free to theorise about the necessary decisive reasons for committing and directing certain activities, in what sense are we tethered to the past?

The answer, of course, is “in a very minimal sense”. Remember: the thinness thesis does not deny all forms enrichment, it just endorses the most plausible minimal degree of it. But even this minimal degree of enrichment can be significant. It can still place genuine constraints on the scope and content of the law. Consider a constitutional provision stating: “No woman shall have the right to vote”. This is pragmatically enriched in the sense that we assume it to be performing a directive speech act, and it is explicitly encoded with an abstract conventional meaning that denies women the right

to vote. Of course, this means the provision could not perform its commissive function since there is no decisive reason to support that view. But that doesn't change the fact that the communicated content denies women the right to vote. The original speech act is defective for sure, but it still sets constraints⁶⁰ and those constraints originate in a historical moment, even if the non-encoded reasons do not.

5.4 - The argument assumes that mutually known, but false conceptions, do not affect communicative content

A more complex critique of the argument can be found in a recent paper by Asgeirsson.⁶¹ His argument is specifically directed at Perry's defence of meaning-textualism, but it can easily be co-opted as counter to my argument. This is because Asgeirsson's argument claims mutually known false beliefs can affect the communicated content of directive and commissive speech acts. This is something that my argument denies.

The objection is based on the alleged impact of mutually known false beliefs on cases involving speech acts with a *mind-to-world* direction of fit, versus those involving speech acts with a *world-to-mind* direction of fit. Speech acts with a mind-to-world direction of fit try to represent the world as it actually is; speech acts with a world-to-mind direction of fit try to change the world to fit with a speaker's desires. An assertion would have mind-to-world direction of fit; a directive or commissive would have a world-to-mind direction of fit.

Working with Asgeirsson's examples,⁶² the claim is that in the case of an assertion like "No mammal weighs more than 15,000 pounds", a speaker's mutually known false beliefs about the applicative scope of the predicate "mammal" does not affect its communicated content. If it is mutually known that the speaker does not think

⁶⁰ I ignore here complications that might arise from other constitutional provisions with vaguer and more abstract content, that might, under modern conceptualisations, override or clash with this provision. For instance, suppose the constitution has two provisions:

1. No woman shall have the right to vote.
2. Every person shall have equality before the law.

The communicated content of the latter is vague, and thinly enriched; the communicated content of the former imposes clearer constraints. Under certain conceptualisations of the reasons for endorsing equality, the latter right may conflict with the former. What happens in such a case is likely to be a matter for non-linguistic criteria to determine (unless there is some explicit hierarchy of rights in the constitutional text).

⁶¹ Asgeirsson, (n 1)

⁶² Asgeirsson (n 1) pp. 18-20

whales are mammals, that does not change the fact that the communicated content is false. The thin view of meaning holds in this case. But in the case of a directive like “Fetch me all the ashtrays in this building” the situation is different. Suppose that new ashtrays were ordered last week and delivered just this morning. If it is mutually known that the speaker does not think the new ashtrays have been delivered, it is, at the very least, unclear whether the directive covers those ashtrays or not. In other words, the thin view of meaning is not obviously correct in this context. As Asgeirsson puts it:⁶³

“[C]ontra Perry - it is not entirely implausible to think that the conception that a speaker has about that to which she wishes to refer, or quantify over, can affect the primary content of the speech act - at least not in the case of directives. And since it is not unreasonable to suppose that this judgment is explained in part by reference to the fact that the speaker’s utterance represented the world as she would (in some sense) like it to be, I think it is sensible to suggest that in the case of speech acts with a world-to-mind fit, false beliefs that a speaker has about that to which she wishes to refer, or quantify over, can affect utterance content.”

Asgeirsson is extremely modest in the conclusions he draws from this argument. He claims merely that this renders the conception-based view of meaning minimally plausible because it renders the extension of a predicate indeterminate. A constitutional example would be the U.S. prohibition on “cruel and unusual punishment”. The original drafters and ratifiers of the constitution may have had false (or unacceptable) beliefs about the applicative scope of that provision. Asgeirsson’s argument claims that those beliefs render the communicated content of that provision ambiguous or indeterminate: it may be restricted in the manner entailed by the false beliefs and it may not. The thin view of meaning is not obviously true in this case.

Although I am happy to grant that Asgeirsson’s argument renders the conception-based view minimally plausible, it is difficult to see how this really undermines my argument. Grant that he has provided *a* reason to think that mutually known false beliefs affect communicated content, my contention is that there are overriding reasons for thinking that they can’t, at least in the case of constitutional speech acts. False or unconvincing conceptualisations of the reasons for action underlying the speech acts undermine their function, and those functions are obvious and compelling properties of

⁶³ Asgeirsson (n 1) pp. 20-21, emphases removed.

what they are. Hence, false or unacceptable beliefs about scope cannot be part of the communicated content.

In addition to this, one can argue that the plausibility of Asgeirsson's argument depends on a lazy analogy between ordinary conversational speech and legal speech. It presumes that in the legal context it is appropriate to associate speech acts with the intentions and beliefs of particular speakers. As we have already seen, this is highly problematic.

5.5 - The argument implicitly depends on a moral/political theory of constitutional law

A final complaint about the argument is that the linguistic conclusion it reaches implicitly relies on a moral/political foundation. Andrei Marmor is the clearest exponent of this objection.⁶⁴ As he sees it, whether one is a thick or thin originalist depends on one's moral conception of constitutional law. In other words, he argues that moral theory is what drives the linguistic conclusions in this debate. If our moral view is that the constitution is an inter-generational precommitment device — i.e. is a historical speech act that commits certain institutions of governance to a fixed set of values — then the linguistic arguments for thick originalism will seem compelling. Contrariwise, if we think there is something morally problematic about inter-generational precommitment, we will be drawn to thin originalism. Either way, it is our intuitions about the moral purpose of the constitution that dictates our linguistic beliefs. The difficulty for Marmor is that these competing moral views are controversial and the dispute between them can only really be resolved by appealing to moral desiderata, not linguistic ones.

Just to be clear, this objection is not simply a rehash of the first objection. The worry about defectiveness was *internal* to the speech act argument. It claimed that even if we grant that the constitution performs directive and commissive speech acts, the assumption that it is non-defective in doing so goes beyond linguistic considerations and commits us to a certain moral view. I rebutted this by denying that the argument *assumes* non-defectiveness. Marmor's objection is *external* to the speech act argument. It is claiming that accepting that the constitution performs directive and commissive

⁶⁴ Marmor 2013 (n 36), pp. 593-596.

speech acts itself presupposes a particular moral view of constitutional law, irrespective of whether it is successful or not.

I want to suggest two responses to Marmor's argument. First, I want to deny that viewing the constitution as a bundle of speech acts presupposes a controversial moral view of constitutional law. As you'll recall, my starting presumption is that it is very difficult to deny that constitutions seek to perform such acts, though I admit there is some controversy on this point. Second, and more importantly, one of the key insights of the speech act argument is that Marmor's characterisation of the thick-thin positions is misleading. Marmor seems to think that presupposing that the constitution performs inter-generational speech acts leads one to the thick view of originalism, but the entire thrust of the argument I have presented is that viewing the constitution as an inter-generational commissive speech act supports the thin view of enriched meaning, not the thick one. The unique features of such an indefinitely extended speech act are what make this so. Thus, it is difficult to see how Marmor presents a compelling objection to the speech act argument.

6. Conclusion

Two questions have been with us from the outset: (i) can the communicated content of a constitutional provision be enriched by its pragmatic context? and (ii) is this something that can be answered by reference to linguistic considerations, or do moral/political considerations necessarily play a role? By investigating the role of pragmatic enrichment in originalist theories of interpretation, I hope to have provided some answers.

As I have argued, in order to make sense of the fixity thesis, originalism must entail some degree of enrichment. Although many originalists appeal to a common knowledge standard of enrichment, this standard is deeply flawed given the doubly strategic nature of legal conversations. When the failure of the common knowledge standard is combined with claims about the nature of constitutional speech acts, we get a compelling case for a thin view of constitutional meaning. This holds that constitutional provisions are enriched to the minimal plausible degree, resulting in an

abstract framework of principles that is cashed out in terms of specific conceptualisations at different moments in time.

None of these conclusions is novel, but in defending them I hope to have provided some novel insights, three of which are worth highlighting here. First, I hope that in isolating and defending the Common Knowledge Thesis, I have highlighted an important assumption — sometimes explicit, sometimes implicit — underlying thick originalism. Second, by adopting concepts from PNL's theory of strategic speech, I hope to have provided a more compelling reason for objecting to the common knowledge standard of enrichment. And third, through the speech act argument, I hope to have provided a novel, linguistic, reason for endorsing thin originalism.